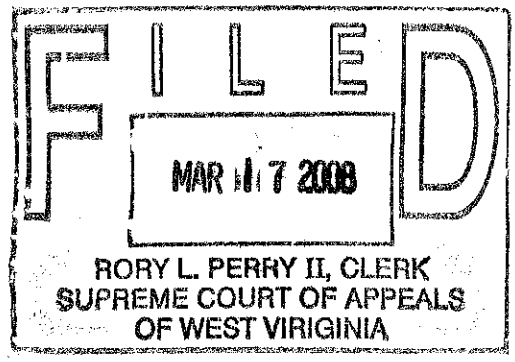
NO. 3306

IN THE
SUPREME COURT OF APPEALS
OF
WESTVIRGINIA



WILLIAM T. SMOOT, II, by his
Next of friend, KARI MAJOR,

Appellant,

v.

Appeal No. 3306

AMERICAN ELECTRIC POWER,
VERIZON OF WEST VIRGINIA INC.
& CHARTER COMMUNICATIONS, INC.,

Appellees.

BRIEF FOR THE APPELLEES, AMERICAN ELECTRIC POWER, VERIZON OF WEST VIRGINIA INC. & CHARTER COMMUNICATIONS, INC.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

Mark H. Hayes, Esquire (WV Bar 4258)
Robinson & McElwee PLLC
700 Virginia Street, East; Suite 400
Charleston, West Virginia 25301
(304) 344-5800

Ronda L. Harvey, Esq. (WV Bar 6326)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1100

Michelle Roman Fox, Esq. (WV Bar 5753)
Martin & Siebert, L.C.
300 Summers Street, Suite 610
Charleston, West Virginia 25301
(304) 345-8020

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Appellees.

AMERICAN ELECTRIC POWER, VERIZON OF WEST VIRGINIA INC., AND CHARTER COMMUNICATIONS, INC.'S JOINT RESPONSE TO APPEAL OF WILLIAM T. SMOOT, II, BY HIS NEXT FRIEND, KARI MAJOR

COME NOW the Appellees, American Electric Power (hereinafter "AEP"), by and through its counsel, Mark H. Hayes and Robinson & McElwee PLLC, Verizon of West Virginia Inc. (hereinafter "Verizon"), by and through its counsel, Ronda L. Harvey and Bowles Rice McDavid Graff & Love LLP, and Charter Communications, Inc. (hereinafter "Charter"), by and through its counsel, Michelle Roman Fox and Martin & Seibert, L.C., and, pursuant to *West Virginia Rules of Appellate Procedure, Rule 10*, hereby jointly respond to the *Appeal of William T. Smoot, II, by his Next Friend, Kari Major*, and, for the reasons and grounds set forth herein, respectfully request that this Court affirm the ruling of the lower Court granting summary judgment in favor of the Appellees.

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

This proceeding arises from a negligence action brought by the Appellant, William T. Smoot, II, by his Next Friend, Kari Major, against AEP, Verizon and Charter, as a result of a bicycle accident involving William T. Smoot, on August 12, 2003. Mr. Smoot, while riding his bicycle down Embassy Drive in Cross Lanes, without a helmet, swerved off the roadway after being unable to negotiate a turn, flew over a steep, grassy embankment and allegedly struck a set of guy wires owned by the three Appellees.

Mr. Smoot filed her Complaint alleging AEP, Verizon and Charter were negligent for failing to place protective guy markers on the guy wires, and, such failure caused and contributed to Mr. Smoot's accident and injuries. The Appellees denied wrongdoing, and, after extensive discovery, jointly filed a motion for summary judgment arguing that they breached no legal duty owed to Mr. Smoot regarding the placement of guy markers around the subject guy wires, since the guy wires in question were indisputably located over a steep, grassy embankment and not in a roadway or known pedestrian walkway. Additionally, AEP, Verizon and Charter argued that Mr. Smoot was a trespasser on their personal property and easements; consequently, the only duty, if any, owed to him was to refrain from willful and wanton conduct and warn of hidden dangers. The guy wires were open and obvious.

After a hearing on February 1, 2007, the lower Court granted the Appellees' Joint Motion for Summary Judgment. The Court found, as a matter of law, that the Appellees did not owe a legal duty to Mr. Smoot to place a marker around the guy wires in question by virtue of the governing regulation, Section 264E of the National Electrical Safety Code. Also, the Court found that the Appellees owed no duty, other than to refrain from willful and wanton conduct, to

Mr. Smoot because he was a trespasser traveling on his bicycle on their right-of-way when he allegedly struck the open and obvious guy wires.

The Order granting the Motion for Summary Judgment was entered by the lower Court on February 23, 2007. Mr. Smoot appeals this Order.

II. STATEMENT OF FACTS

On August 12, 2003, William T. Smoot, who was then thirteen years old, was riding his bicycle with several friends on Embassy Drive in Cross Lanes, West Virginia. The roadway on which he was riding his bicycle was of a steep grade, and he had only ridden his bicycle down this roadway on a few occasions prior to the accident. (Smoot Dep. Trans., p. 24, attached as Exhibit A to *American Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal*). The accident occurred close to dusk as confirmed by Mr. Smoot who testified it was "a little later in the day, it was a bit harder to see." (Smoot Dep. Trans., p. 22, attached as Exhibit A to *American Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal*). The boys who were riding with Mr. Smoot stated that he was ahead of all of them as they were riding down the hill. All agreed that he was traveling down the roadway "pretty fast". (Smoot Dep. Trans., p. 140, attached as Exhibit B to *American Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal*). As Mr. Smoot approached a left-handed curve in the roadway, he was unable to negotiate the curve and at that point Mr. Smoot and his bicycle veered off the roadway and struck a rock barrier located at the edge of Anna Jane Farley's driveway. As a result of hitting the rock barrier, Mr. Smoot was flung into the air and at some point separated from his bicycle and then rolled down the hill before coming to a rest. One of the boys with him on the day of the accident, Josh

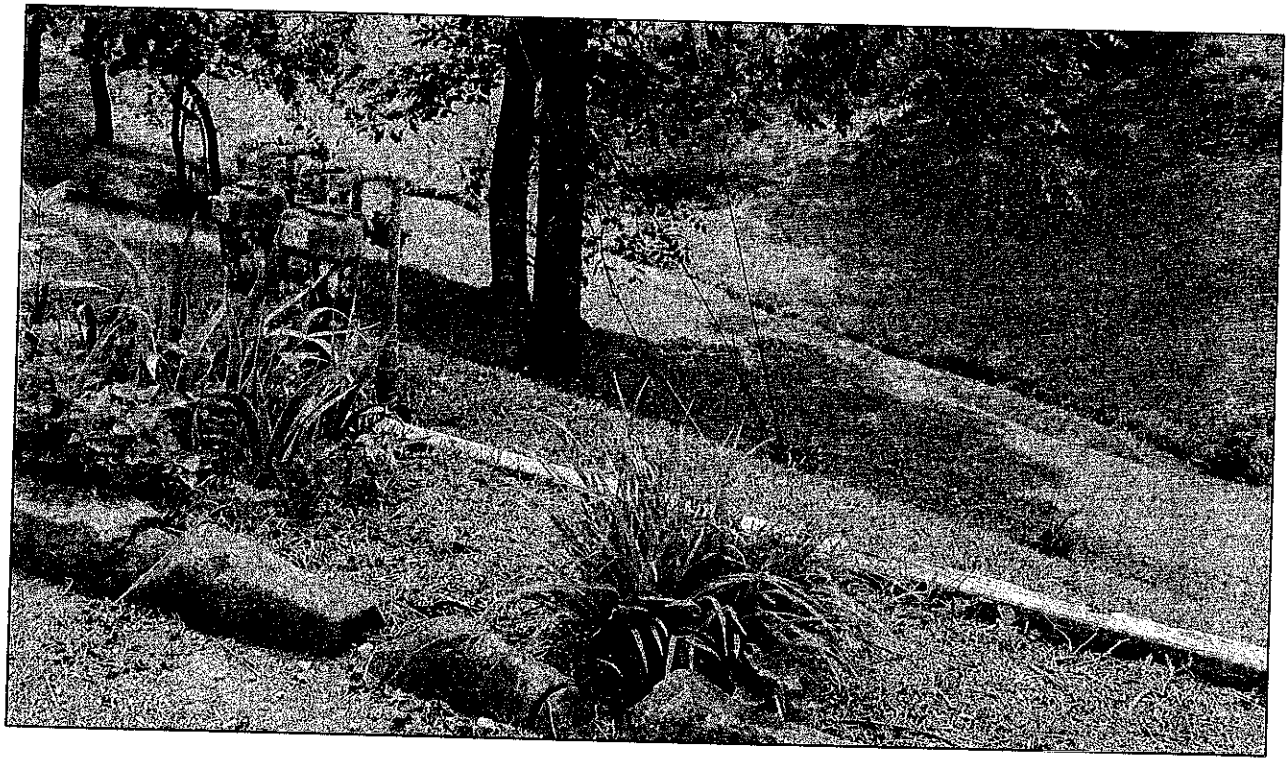
Harper, was deposed on June 16, 2005. Mr. Harper was the oldest of the boys riding with Mr. Smoot and testified he witnessed the accident. According to Mr. Harper, Mr. Smoot was unable to complete the turn in the road and instead went off the road and hit a pile of decorative rocks near the roadway and became airborne. The next time Mr. Harper saw Mr. Smoot, he was lying at the flat area over the steep embankment. (J. Harper Dep. Trans., pp. 16-17, attached as Exhibit C to *American Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal*).

All of the boys riding bikes with Mr. Smoot, as well as the property owner, Melba Farley, testified that although Mr. Smoot and/or his bicycle may have hit one of the guy wires, the impact occurred only after he was airborne. (*See*, Exhibits D, E and G attached to Appellees' *Joint Motion for Summary Judgment* filed in the lower Court.)

Mr. Smoot provided deposition testimony in this case and importantly, testified that he recalls only minimal facts surrounding the accident. He does not recall how he got from the roadway to where he ended up after he wrecked his bicycle. (Smoot Dep. Trans., pp. 48-49, attached as Exhibit E to *American Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal*). Furthermore, Mr. Smoot does not recall if he was steering his bicycle, and attempting to avoid any obstacles as he left the roadway. (Smoot Dep. Trans., p. 143, attached as Exhibit F to *American Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal*). Significantly, Mr. Smoot provided unequivocal testimony that he does not know whether he hit any of the guy wires and/or whether the guy wires in any manner contributed or caused him to wreck his bicycle. (Smoot Dep. Trans., p. 53, attached as Exhibit G to *American*

Electric Power, Verizon of West Virginia Inc., and Charter Communications, Inc.'s Joint Response to Petition for Appeal).

Additionally, contrary to Appellant's factual assertions, no evidence has been submitted to establish that the guy wires caused Mr. Smoot's injuries. It is just as plausible that Mr. Smoot's severely broken leg was caused by him crashing to the ground after he hit the rock barrier, at a high rate of speed, and was flung into the air. There simply is not even a scintilla of evidence, as suggested by Mr. Smoot in his appeal brief, that he was steering down the steep embankment, and only wrecked his bicycle after he hit the guy wires which were not visible to him. As evidenced by the photograph of the scene below, and the photograph contained on page 4 of Appellant's Brief, the entrance to Ms. Farley's yard is blocked by a rock barrier, a gas meter, a mailbox, and the utility pole. Thus, it would be at a minimum challenging for anyone to enter the property on a bicycle and steer down the embankment, especially after leaving the roadway due to being unable to negotiate the curve in the roadway.



As a result of the accident, Mr. Smoot sustained injuries to his left lower leg, which required surgery. However, since that time, Mr. Smoot has made a significant recovery, and, has returned to many of his pre-accident activities, including skateboarding. Dr. Russell Buindo, Mr. Smoot's physical medical and rehabilitation specialist, testified during his November, 2005 deposition that Mr. Smoot rode his skateboard for him during the examination and he had excellent balance. (Buindo Dep. Trans., p. 48, attached hereto as Exhibit A.) Mr. Smoot also confirmed during his own deposition that he has returned to pre-accident activities, including riding his skateboard and even carrying groceries while riding. (Smoot Dep. Trans., pp. 112-113, attached as Exhibit E to *American Electric Power, Verizon of West Virginia, Inc. and Charter Communication Inc.'s Joint Response to Petition for Appeal.*)

Subsequent to the accident, Mr. Smoot filed the underlying action against AEP, Verizon and Charter alleging that the Appellees owed a duty to him to place guy markers on the guy wires supporting the utility pole in Anna Jane Farley's yard. Smoot also alleges that the absence of these guy markers caused and contributed to his accident and injuries.

All parties agree that the National Electrical Safety Code ("NESC") governs the requirements imposed upon the utilities in this case to have markers on the guy wires in question. Specifically, ANSI, Standard C2 of the NESC is compiled by the Institute of Electrical Engineers ("IEEE"), an Accredited Standards Committee, which develops and publishes the NESC. The NESC contains the standards which cover the basic provisions for safeguarding persons from hazards which may arise from the installation, operation, and maintenance of electrical supply and communication systems.

The applicable section of the NESC, Section 264E, provides as follows:

E. Guy Markers and Protection.

1. The ground end of anchor guys exposed to pedestrian traffic shall be provided with a substantial and conspicuous marker.

2. Where an anchor is located in an established parking area, the guys shall either be protected from vehicle contact or marked.

3. Nothing in this rule is intended to require protection or marking of structural components located outside the traveled ways of roadways or established parking areas. Experience has shown it is not practical to protect structures from contact by out-of-control vehicles operating outside established travel areas.

The Appellees' joint expert, Frank A. Denbrock, P.E., provided Affidavit testimony that based upon the plain language of the NESC as well as his education, experience, knowledge, and personal observation of the scene, there existed no requirement for the utilities in this case to place a marker around the guy wires at issue. (*See*, Exhibit I, attached to the Appellees' *Joint Motion for Summary Judgment*). The guy wires were located over a steep embankment, not on or near any sidewalk or established or known walkway, and, according to Mr. Smoot's own rendition of facts, at least 19 feet from the roadway. These guy wires were clearly not in an area routinely and commonly exposed to "pedestrian traffic."

The lower Court, in granting summary judgment, interpreted the plain language of the NESC, and concluded that based upon the location of the guy wires over the steep embankment, they were "not exposed to pedestrian traffic." Consequently, AEP, Verizon and Charter were in compliance with the requirements of the NESC and owed no duty, as a matter of law, to Mr. Smoot. Furthermore, the lower Court found that Mr. Smoot entered upon Mrs. Farley's property purposefully, and without permission; thus, was a trespasser under the law. The guy wires were open and obvious, and no duty to Mr. Smoot was breached by AEP, Verizon and Charter.

The Order of the lower Court should be affirmed.

III. DISCUSSION OF LAW

A. THE CIRCUIT COURT WAS CORRECT WHEN IT FOUND THAT THE APPELLEES DID NOT VIOLATE THE PROVISIONS OF THE NESC

1. The Provisions of the National Electrical Safety Code Do Not Create a Duty to Mark the Relevant Guy Wires

The provisions of the Accredited Standards Committee C2-2002, National Electrical Safety Code (NESC)[1] are the controlling standards for safeguarding persons from hazards which may arise from the installation, operation and maintenance of electrical supply and communications systems. This code, as adopted by the West Virginia Public Service Commission, provides ample support for the position that the Appellees did not owe the Appellant a duty. W. Va. C.S.R. § 150-3-5. In particular, the NESC includes specific standards for the marking of guy wires in its section 264E:

> E. Guy Markers and Protection
>
> 1. The ground end of anchor guys ***exposed to pedestrian traffic*** shall be provided with a substantial and conspicuous marker.
> *NOTE:* Visibility of markers can be improved by the use of color or color patterns that provide contrast with the surroundings.
>
> 2. Where an anchor is located in an established parking area, the guy shall either be protected from vehicle contact or marked.
>
> ***3. Nothing in this rule is intended to require protection or marking of structural components located outside of the traveled ways of the roadways or established parking areas. Experience has shown that it is not practical to protect structures from contact by out of control vehicles operating outside established roadways.***

[1] The National Electrical Safety Code is compiled by the Institute of Electrical Engineers (IEEE) Accredited Standards Committee. Its provisions note that the NESC is recognized as an "American National Standard", and "implies a consensus of those substantially concerned with its scope and provisions."

NESC Section 264E (2002 Edition; emphasis added).

Under West Virginia tort law, "[t]he resolution of any question of tort liability must be premised upon fundamental concepts of the duty owed by the tortfeasor." *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). Therefore, "[i]n order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff." *Id.* (citing Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981); Syl. Pt. 4, *Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995)).

The determination of whether a duty is owed to the plaintiff "is not a factual question for the jury; rather '[t]he determination of whether a plaintiff is owed a duty of care by the defendant must be rendered as a matter of law by the court.'" *Id.* "Only the related questions of negligence, due care, proximate cause, and concurrent negligence. . ." are to be decided by the jury. *Id.* (citing *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964)). "'A person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinarily prudent person.'" *Id.* at 491 (citing *Puffer v. Hub Cigar Store*, 140 W. Va. 327, 84 S.E.2d 145 (1954) (overruled on other grounds)).

In this case, the evidence clearly and unequivocally shows that the Appellees owed no duty to the Appellant to mark the guy wires at issue. The trial court was correct in granting summary judgment.

a. The Appellees owed no duty to the Appellant because the guy wires were not exposed to pedestrian traffic.

As noted above, the 2002 edition of Section 264E.1 provides that "[t]he ground end of anchor guys exposed to pedestrian traffic shall be provided with a substantial and conspicuous

marker." (emphasis added). Frank A. Denbrock, P.E., Appellees' joint expert witness, has been intimately involved with the NESC, including Section 264E, for more than 40 years. (*See* Exhibit I to *Defendants' Joint Motion for Summary Judgment*). Mr. Denbrock currently serves as the Vice Chairman of the NESC, a position he has held since 1985. Mr. Denbrock has also served as Chairman of the NESC Subcommittee 5, the subcommittee responsible for the development and coordination of various NESC requirements, including but not limited to, Section 264, Guying and Bracing (*See* Exhibit I).

Mr. Denbrock has personally inspected the scene where Mr. Smoot's bicycle accident occurred, including the guy wires in question. As admitted by the Appellant in his brief, the guy wires are located at least 19 feet from the road on a steep, grassy slope. This area is not easily accessible to either pedestrian or vehicular traffic. Based upon his extensive education, experience and knowledge of the NESC and his inspection of the accident site, Mr. Denbrock's opinion is that the guy wires in questions are not exposed to pedestrian traffic as that phrase is utilized by the NESC. (*See* Exhibit I); (emphasis added). In fact, the guy wires are open and obvious. Because the guy wires are open and obvious and not exposed to pedestrian traffic, the NESC did not require that the guy wires be marked or guarded. (*See* Exhibit I). Therefore, Appellees did not violate any NESC Rules, including but not limited to, section 264.

The Appellant cannot maintain his negligence action without establishing that Appellees breached a duty owed to him. *Jack v. Fritts,* 193 W.Va. at Syl. Pt.4. The NESC contains the national standards for electrical and telecommunications facilities and, as noted previously, does not require Appellees to mark or guard the guy wires in question because they are not exposed to pedestrian traffic. In fact, the guy wires are located in an area where pedestrians would not normally have access absent extraordinary circumstances such as Mr. Smoot's accident. The

NESC only requires that Appellees mark guy wires exposed to pedestrian traffic. Mr. Denbrock's opinion reiterates what is clear from observing the scene of the accident: These guy wires were not exposed to pedestrian traffic and were open and obvious. Therefore, Appellees complied with all duties and responsibilities imposed upon them with regard to the guy wires.

Section 264E clearly does not require the marking of *all* guy wires, and specifically notes that "[n]othing in this rule is intended to require protection or marking of structural components located outside of the traveled ways of roadways or established parking areas." Section 264E even states the reason for not marking guy wires outside traveled ways: "[e]xperience has shown that it is not practical to protect structures for contact by out of control vehicles operating outside of established traveled ways." The Appellant would have this Court impose a ruling that would require *all* guy wires be marked if it is even remotely possible for pedestrians to have access to the guy wires. Appellant's own expert, James A. Taylor, opined that if guy wires were utilized on (for instance) Mount Everest, and only accessed by one 'pedestrian' a year, then the guy wires should be marked (Taylor Dep. Trans., p. 68 attached as Exhibit I to *Defendants' Joint Response to Plaintiff's Petition for Appeal*). Such is clearly not the intent of the provisions of the NESC.

Accessibility is not the standard. The NESC requires only guy markers on guy wires that are *exposed* to pedestrian traffic. Mr. Taylor ignores this distinction and instead broadens the NESC requirement to include any guy wire that could be *accessed* by a pedestrian even if the guy wire is not exposed to pedestrian traffic. Mr. Taylor's extremely broad interpretation of the NESC is clearly contrary to that of Mr. Denbrock, who is the Vice-Chairman of the NESC and has been actively involved with the NESC for more than 40 years. Notably, Mr. Taylor is not qualified to render opinions regarding the interpretation or meaning of the NESC as he is not an

expert in any relevant field. (*See, Defendants' Motion in Limine to Exclude Testimony of James A. Taylor* filed with the lower court).

In addition to his own expert, Appellant also cites to the testimony of American Electric Power (AEP) Line Specialist James M. Hannah to support his argument that the guy wires are exposed to pedestrian traffic. Mr. Hannah testified that AEP goes beyond the safety standards of the NESC in the maintenance of their poles and lines. Based on this testimony, Appellant argues that Appellees should be held to a higher duty under the law. Such reasoning is flawed and without merit. In fact, Mr. Hannah agrees with Appellees' expert and testified that guy markers are not required where there is no sidewalk or pathway receiving pedestrian traffic or where there is no roadway traveled on by vehicles. (*See* Hannah Dep. Trans., pp. 17, 34, attached as Exhibit J to *Defendants' Joint Response to Plaintiff's Petition for Appeal*).

The Appellant lastly argues that the Appellees owed the Appellant a duty based on policy considerations. Specifically, the Appellant argue that "policy considerations also factor into the determination of whether Appellees owed a duty to the Appellant, including consideration such as the foreseeability of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the Appellees." (*See* Brief for the Appellant, p. 32.) When considering all of these factors, the Appellant's argument fails. It is clear that the drafters of Section 264 of the NESC contemplated these factors when formulating the rule. This is evidenced by the fact that the rule expressly states that "[n]othing in this rule is intended to require protection or marking of structural components located outside of the traveled ways of roadways or established parking areas." The drafters of this rule clearly believed that parties such as the Appellees had no duty to mark guy wires where such guy wires are located away from roadways, as is the case here.

Additionally, it is not reasonably foreseeable that a bicyclist would steer or lose control of his bicycle, hit a rock barrier, become airborne, and launch approximately 20 feet to the guy anchor ends at issue. The Appellant cites the fact that the Appellees had notice of a problem with the guy wires since Mr. Clinton Carpenter had an automobile accident in the same spot. This incident is discussed in greater detail in this brief's Section B(1)(a), *infra*; however, it is important to note that Appellant's reliance on this incident is misplaced for several reasons. There is no way that placing guy markers on anchor ends would have prevented Mr. Carpenter's accident as he was admittedly out of control. In addition, existing case law states that "freak" accidents, such as the one at issue here, does not place a duty on utility companies to protect citizens from harm when their vehicles exit public roadways. *See, Coates v. Southern Maryland Elect. Co-op, Inc.*, 354 Md. 499, 731 A.2d 931 (1999); *Contey v. New Jersey Bell Telephone Co.*, 136 N.J. 582, 643 A.2d 1005 (1994); *Florida Power & Light Co. v. Macias by Macias,* 507 So.2d 1113 (Fla.App. 1987); *Ball v. New Jersey Bell Telephone Co.*, 207 N.J.Super. 100, 504 A.2d 29 (N.J. Super. 1986).

The Appellant states repeatedly that the magnitude of any burden placed upon the Appellees by requiring them to put guy markers on the guy wires balancing their utility pole is *de minimus.* In support, the Appellant state that the cost of a guy wire marker is approximately $10.00. It may be a *de minimus* burden to place guy wire markers on one pole. However, if the Appellees were required to place guy markers on every pole that could possibly be *accessed* by members of the public, the burden would not be *de minimus.* In effect, the Appellees would be required to spend a plethora of capital to make such changes. This huge burden is not outweighed by the chance that a cyclist would exit the known roadway and wreck into the guy wire regardless of the existence of the marker. Since all of the evidence points to the fact that the

guy anchor ends are not exposed to vehicle and pedestrian traffic, and since the Appellant did not present any credible evidence to refute this fact, the trial court correctly entered judgment in favor of the Appellees on the issue of the Appellees' duty to place guy markers on the anchor ends.

The Supreme Court of Wisconsin is one of the few courts which have looked at language similar to the provision of the NESC relevant to this action. In the case of *Phelps v. Wisconsin Telephone Co., et al.*, 11 N.W. 2d 667 (Wis. 1943), that Court reviewed a matter with similar facts to the one before this Court. In *Phelps,* the accident occurred when the Plaintiff's decedent backed a road grader into a utility pole's unmarked guy wire. Wisconsin law at the time required that "[the] ground end of all guys attached to ground anchors exposed to traffic shall be provided with a substantial and conspicuous guard. . . ." (Wisconsin Safety Order 1282E of the Wisconsin State Electrical Code). The pole and wire were located at the end of a paved road, and there was some evidence that the area was utilized by children. The Court stated emphatically:

> There was some evidence that a foot path existed about three feet to the east of the pole and that children used this as a shortcut to school. This does not establish that the guy wire is **exposed** to **pedestrian traffic** and if it did, it would not have any tendency to indicate that it was exposed to vehicular traffic.

Phelps, at p. 670 (emphasis added).

It is important to recognize the distinction between *accessible* and *exposed.* The Appellant wants this Court to mandate all guy wires to be marked, no matter how remote their location. Clearly, neither the NESC nor West Virginia law requires such a burden and the trial court in this matter was correct in ordering summary judgment on behalf of the Appellees.

b. The Appellant's reliance on Section 232 of the NESC is misplaced and specious.

In his brief, Appellant relies heavily on Section 232 of the NESC and the Fourth Circuit Court of Appeals case of *McKinnon v. Appalachian Electric Power Co.*, 261 F.2d 292 (4th Cir., 1958). As explained below, Appellant's reliance on both this NESC provision and the *McKinnon* case is, at best, erroneous and perhaps specious in nature.

Section 232 of the NESC is entitled:

> "Vertical Clearances of Wires, Conductors, Cables, and Equipment Above Ground, Roadway, Rail or Water Surfaces"

It is important to note that Section 232 does <u>not</u> include <u>any</u> provisions relating to guy wires such as those the subject of this litigation. The wires referenced in Section 232 are live electrical wires; as such, on its face, this provision is clearly irrelevant to this matter.

For similar reasons, the Appellant's reliance on *McKinnon v. Appalachian Electric Power Co.*, 261 F.2d 292 (4th Cir. 1958) is misplaced and will not prevent a ruling in favor of the Appellees. The Appellant attempts to use the case in support of his position that the guy anchor ends were exposed to vehicular and pedestrian traffic. However, as noted, the *McKinnon* opinion does not apply to the interpretation of the NESC standard at issue in this case. Instead, it deals with Section 232 of the NESC, a provision intended to protect pedestrians from high-voltage electrical lines.[2] Further, the facts of that case are totally different than this case. In *McKinnon*, the Plaintiff was burned by an uninsulated 13,200-volt electrical line; in this case at bar, the Mr. Smoot steered or lost control of his bicycle becoming airborne and landing on or

[2] Section 232 of the NESC states, in relevant part, "[the] vertical clearances of wires, conductors and cables above ground in generally *accessible* places, roadway, rail, or water surfaces, shall be not less than that shown in Table 232-1." [NESC 2002 Edition (emphasis added)]. At the time *McKinney* was decided, the applicable provision stated, in relevant part, "[the] vertical clearance of all wires above ground in generally accessible places or above rails shall ... be no less than the following:...(5) Spaces or ways accessible to pedestrians only ...15 feet." As opposed to supporting the Appellant's position in this matter, this provision actually supports that of the Appellees by drawing a clear distinction between areas that are *accessible* and those *exposed to pedestrian traffic.*

around a guy wire anchor end. There is no similarity of facts, and the applicable provisions of the NESC are not transferable from one case to the other. Therefore, the Appellant's reliance on *McKinnon* is misplaced.

c. Appellant's claim that the guy wires at issue were not properly inspected is without merit and unsupported by the record.

In his brief, Appellant alleges that none of the Appellees inspected the guy wires at issue in this case. (*See*, Appellant's Brief, at pp. 24-25). His brief expressly states that "[u]nfortunately, all of the Appellees utility companies failed to inspect the lines." This statement is utterly and completely false.

Appellant is correct that the Appellees are required to inspect the guy wires pursuant to Rule 214 of the NESC. In relevant part, the rule states:

NESC Rule 214 – Inspection and Tests of Lines and Equipment:

A. WHEN IN SERVICE

1. INSPECTION

Lines and equipment shall be inspected at such intervals as experience has shown to be necessary.

By the very express terms of this Rule, the interval of inspection is left to the discretion of the utility, based upon what its experience shows "to be necessary."

Representatives of Appellees American Electric Power and Charter Communications, Inc. have both testified clearly that the poles and all attached guys are inspected periodically. James Hannah, Line Specialist for American Electric Power, testified that AEP contracts with "Osmos Contractors" to perform regular inspections. (*See* James Hannah Dep. Trans., p. 37, attached as Exhibit J to *Defendants' Joint Response to Plaintiff's Petition for Appeal*). In addition, Mr. Hannah testified that each AEP linemen inspects poles, guy wires, etc. each and

every time that lineman performs work on a pole (Hannah Dep. Trans., p. 43). Lastly, Mr. Hannah noted that "zone inspections" are performed regularly which also includes inspections of poles and guy wires (Hannah Dep. Trans., p. 42).

Similarly, William Parton, Director of Technical Operations with Charter Communications, Inc., testified that his company checks its lines annually and, if any problem existed with the line, pole or guy wires, such would be reported to the local office to be repaired. (*See* William Parton Dep. Trans., p. 35, attached hereto as Exhibit B).

It is instructive to note that the Appellant boldly makes the allegation that the Appellees failed to properly inspect the lines – without asking any of the Appellees interrogatories requesting information relating to inspections of the lines. In addition, while AEP and Charter representatives testified in their depositions regarding their inspections of the poles, wires, etc., the Appellant chose not to even ask questions about such inspections of the representative of Verizon (Ricky Myers).

The Appellant's argument that the guy wires were not inspected clearly is without merit, and clearly is lacking in factual support. It appears to be nothing more than a 'red herring' intending to divert this Court's attention from the real issue; that is, that the trial court was correct in her analysis of this matter and her Order granting summary judgment should be upheld.

Lastly, it should be pointed out that the Appellant did not raise the issue of inspections of the pole and guide wires during his filed response to the Appellees' Joint Motion for Summary Judgment in the court below. Additionally, the Appellant did not raise the inspection issue during oral arguments on that motion before the trial court. The first time such argument was

raised by Appellant was in his Petition for Appeal and, thus, he should be precluded from raising this issue at this time. *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882, 894 (2000).

B. THE CIRCUIT COURT CORRECTLY DETERMINED THAT MR. SMOOT WAS A TRESPASSER AND THAT THE APPELLEES BREACHED NO DUTY TO HIM

1. Mr. Smoot was a trespasser, and Appellees did not inflict willful or wanton injury on him.

The Circuit Court correctly concluded that Mr. Smoot was a trespasser when he rode his bicycle onto Anna Jane Farley's and Appellee's property. The definition of trespasser is well established:

> A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.

Huffman v. Appalachian Power Co., 415 S.E.2d 145, 187 W. Va. 1 (W. Va. 1991). Although Appellant originally argued in the Petition for Appeal that Mr. Smoot "inadvertently" steered his bike onto Ms. Farley's property [Petition, p. 17], Appellant apparently has recognized the inaccuracy of this statement and admits that Mr. Smoot "opted to steer his bicycle over the hillside located in Anna Farley's yard." *See* Appeal Brief, p. 10. Thus, Mr. Smoot is clearly a trespasser under West Virginia law.

Even though Appellant admits Mr. Smoot chose to ride his bicycle onto Ms. Farley's property, Appellant nevertheless denies that Mr. Smoot was a trespasser. Appellant relies on *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967) for the proposition that Mr. Smoot "cannot be classified as a trespasser as to one who maintains **electric wires** either on or such proximity to lands of a third person so that the child on such lands may come in

contact with the **electric wires**." Appellant's Brief, p. 9. However, Mr. Smoot's entrance onto Ms. Farley's and Appellee's property did not expose him to "electric wires."[3] The wires Mr. Smoot claims he struck were not "electric wires," but instead were guy wires that are placed on a utility pole to keep it in as vertical as possible position. Guy wires are not charged with electricity. An individual who simply touches the guy wires will not receive even the slightest electrical shock and should not be injured. Indeed, the guy wires were in place for many years, and there is no evidence that any individual was ever injured from touching the guy wires.

a. The guy wires are not a dangerous instrumentality.

Appellant would like this Court to find that the guy wires are a dangerous instrumentality. In support of this proposition, Appellant relies on two cases that have nothing to do with guy wires: *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967) and *Adams v. Virginia Gasoline & Oil Co.*, 109 W. Va. 631, 156 S.E. 63 (1930). *Sutton* is over 50 years old and *Adams* is almost 80 years old. In *Sutton*, a ten-year-old boy was electrocuted when he fell onto a 2,400 volt electrical transmission line while playing in a 30-foot high sawdust pile. The court concluded that the 2,400 volt electrical transmission line was a dangerous instrumentality. 151 W. Va. at 971. When contacting a 2,400 volt electrical transmission line, imminent death will surely follow. Conversely, no injury at all should occur from simply touching guy wires. Obviously, the dangerous nature of a 2,400 volt electrical transmission line is quite different than a guy wire. Thus, Appellant's reliance on *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967), is misplaced.

For similar reasons, Appellant's reliance on *Adams v. Virginia Gasoline & Oil Co.*, 109 W. Va. 631, 156 S.E. 63 (1930) is likewise unwarranted. In *Adams*, a child died when he

[3] By focusing on exposure to "electric wires," Appellant seems to have forgotten that Appellant has sued not only American Electric Power, but also Verizon West Virginia Inc. and Charter Communications, Inc. Neither Verizon nor Charter maintain "electric wires."

breathed in noxious gas vapors in a stock pen maintained by the defendant. The court concluded that the stock pen overlying a leaking gas line was a dangerous instrumentality and specifically stated "the volatile and dangerous nature of gasoline is recognized by the courts." 109 W. Va. at 636.

The cases relied upon by Appellant all deal with obvious dangerous instrumentalities. In *Adams*, the dangerous instrumentality was the stock pen filled with noxious gasoline fumes described by the court as "a place of grave danger," and in *Sutton*, the dangerous instrumentality was a 2,400 volt electrical line. 109 W. Va. at 638, 156 S.E. at 66. Appellant has provided the Court with no case holding that guy wires could reasonably be considered a dangerous instrumentality. Instead, courts have held that guy wires attached to utility poles are not a dangerous instrumentality. *See Thompson v. Cumb. Telp. & Telg. Co.*, 138 Ky. 109. 127 S.W. 531 (Ky. Ct. App. 1910) (holding that a four-year-old child whose left index finger was amputated when it was caught in a guy wire, was a trespasser upon the guy wire; the guy wire was not a dangerous instrumentality and judgment for the phone company was upheld); *see also*, *Kentucky Power Co. v. Bayes*, 423 S.E.2d 249 (Ky. 1968) ("the mere maintenance of an exposed guy wire on private property does not constitute a violation" of the duty to refrain from inflicting wanton or willful injury).

In this case, the guy wires in question cannot reasonably be considered a dangerous instrumentality. Even if the Court accepts Appellant's characterization of the guy wires as dangerous, the guy wires may only be deemed a "dangerous instrumentality" if Appellants were "aware or reasonably should be aware that trespassers are constantly intruding upon a limited area thereof which may expose them to the dangerous condition." *Huffman*, 187 W. Va. at 7, 415 S.E.2d at 151 (emphasis added). There is absolutely no evidence in this case that trespassers

constantly intruded upon the guy wires. Over the many years that the guy wires were located on Anna Jane Farley's property prior to Mr. Smoot's accident, there is only one accident involving contact with the guy wires. That accident is quite different than Mr. Smoot's. First, it occurred on a winter night when the conditions on the road were dismal at best. The driver of the vehicle testified that he attempted to avoid hitting a four-wheeler and slid off the slick roadway approximately 20 feet before he hit the guy wires. This one accident is more similar to an accident that occurred in *Schrader v. Great Plains Electric Co., Inc.*, 19 Kan. App.2d 276, 868 P.2d at 536 (1994). The court in *Schrader* held that defendant owed no duty to the driver who left the roadway and hit the guy wires:

> While it is common knowledge that vehicles on occasion leave the roadway and strike adjacent utility poles and guy wires, a duty to third persons will not be imposed upon those who erect and maintain such objects in the absence of reasonable anticipation of such deviation from the roadway as a normal incident of travel. Negligence must be predicated upon what one should anticipate rather than merely on what actually happened. That someone, after an accident, can think of things which, if done might have made the accident less likely does not constitute proof of negligence. In this case, given the length of time the guy wire at issue had been in place, the volume of traffic on the adjacent road, and the lack of similar accidents at the same location,[4] it cannot be said that it was reasonably foreseeable that a member of the traveling public would stray from the road and collide with the guy wire[.]

19 Kan. App.2d at 282, 868 P.2d at 540 (citations omitted). Like *Schrader*, it was not reasonably foreseeable that Mr. Smoot would cross Ms. Farley's driveway, go over a rock barrier and adjacent flower bed and landscape timbers, down a steep grassy embankment approximately 20 feet off the roadway and strike Appellees' guy wires. Second, as noted by Appellee's expert, Frank Denbrock, Vice Chairman of the NESC, the NESC does not require the marking or

[4] In *Schrader*, "witnesses could only recall one automobile accident in the vicinity of the [utility] pole" prior to the accident at issue. 19 Kan. App.2d at 280. The *Schrader* court concluded that one prior accident was not enough to make it "reasonably foreseeable" someone would stray from the roadway and collide with the guy wires. *Id.*

protection of structural components, including guy wires, from contact by vehicles operating outside of established traveled ways. Affidavit of Frank A. Denbrock ¶ 7, Exhibit I to *Defendants' Joint Motion for Summary Judgment.*

It is important to point out that the plaintiff trespasser in *Schrader* was fourteen-years old. In *Adams*, this Court reiterated that "children are not exempt from the general rule that a proprietor owes no duty to trespassers except not wantonly or willfully to injure them." The only exception to this general rule is where there is an exposed and unguarded danger, known to the proprietor, and where it is also known to the proprietor (a) that children are in the habit of resorting for play to his property, at the place of danger, or in its immediate vicinity or (b) the children are actually present at the time and place of danger. 109 W. Va. at 637, 156 S.E. at 66. In both *Sutton* and *Adams*, cases relied upon by Appellant, children had often played at or near the dangerous instrumentality and the landowner was aware that the area attracted children. These facts are significantly different than the facts in the present case. There is absolutely no evidence in this case that children were in the habit of resorting for play anywhere on Ms. Farley's property, and further no evidence that children ever rode bicycles on the steep embankment on Ms. Farley's property.

If this Court ruled that guy wires lawfully placed approximately 20 feet from the road down a steep embankment are dangerous instrumentalities, it would necessarily have to conclude that everyday items placed on a landowner's property such as mailboxes, landscaping and other similar items are also dangerous instrumentalities. Allowing Appellant to proceed on such a theory would present a fair reaching precedent. To do so would expose the judicial system to claims against landowners by trespassers who are injured by anything on the landowners'

property. Such stern liability would fly in the face of the traditional respect given to the rights of landowners.

b. Appellees did not willfully or wantonly injure Mr. Smoot.

The duty owed to a trespasser is simply to "refrain from willful or wanton injury." *Mallet v. Pickens*, 206 W. Va. 145 522 S.E.2d 436 (1999). *See also, Brown v. Carvell*, 206 W. Va. 605, 527 S.E.2d 149, 153 (1998); *McMillion v. Selman*, 193 W. Va. 301, 456 S.E.2d 28 (1995). Appellant argues that Appellees acted in a "willful, wanton manner in not only creating the condition [guy wires] but allowing it to exist." Appellant Brief, p. 17. However, the facts Appellant lists in support of Appellees' willful, wanton behavior are all inaccurate. Interestingly, Appellant cites to no deposition testimony or documents supporting any of the facts listed by Appellant. The first inaccurate fact relied upon by Appellant is Appellees' alleged awareness that children, both pedestrians and bicyclists frequented the area where the guy wires were located. As mentioned above, there is absolutely no evidence that children had ever played anywhere in the yard of Ms. Farley, and there is no evidence that bicyclists ever rode into Ms. Farley's yard over the steep embankment prior to Mr. Smoot's accident. All of the boys who were riding bicycles with Mr. Smoot on the day of his accident have been deposed in this case and not one of them testified that they had ever ridden their bicycles into Ms. Farley's yard over the steep embankment or that they had ever played in Ms. Farley's yard.

Another inaccurate fact relied upon by Appellant is Appellees' alleged awareness that the guy wires blended in with the surrounding trees and grass. However, as noted by Appellees' expert, Frank Denbrock, Vice Chairman of the NESC, the guy wires were "open and obvious." Affidavit of Frank A. Denbrock, ¶ 6, Exhibit I to *Defendants' Joint Motion for Summary*

Judgment. In addition, the photograph shown herein indicates that Appellant's statement is simply not true. The guy wires clearly are noticeable on the photographs and in person.

Finally, Appellant also incorrectly states Appellees knew that contact with the guy wires could cause serious bodily injury. Again, Appellant cites no evidence supporting this brash statement. There is absolutely no evidence that simply contacting the guy wires could cause serious bodily injury. While Appellant makes self-serving arguments that Appellees acted in a willful and wanton fashion, Appellant has produced absolutely no evidence to support Appellant's arguments.

Appellant then argues that if the guy wires had contained markers, Mr. Smoot could have avoided them. This is mere conjecture and speculation and also has no place before this Court. Appellant has produced no accident reconstruction expert to testify that Mr. Smoot could have avoided the guy wires. Appellant requests that Appellees provide "the simple and inexpensive marking of guy wires in order to make the wires visible to people in the vicinity of the utility pole." First, as noted, the guy wires are visible. Second, Appellant has cited no evidence to this Court that marking of guy wires is inexpensive. Certainly, mass marking of all guy wires over the state of West Virginia would be an expensive and time-consuming proposition and is <u>not</u> required by the NESC or any other law of this State.

Even if the expense of placing markers on the guy wires is negligible, it is not required and Appellees cannot be cited for willful or wanton activity by not marking the guy wires. *See*, *Nichol v. Bell Telephone Co.*, 266 Pa. 463, 109 A.649 (Penn. 1920). In *Nichol*, a five-year-old boy was injured when he climbed his neighbor's fence and caught his foot in a telephone wire that the telephone company had placed across the fence. Although the wire could have been placed elsewhere at slight expense, the court held that the child tripping on the wire did not prove

the telephone company's negligence. "[C]hildren trip on many objects perfectly harmless and properly located." *Nichol*, 266 Pa. 467. The court further stated:

> The law demands the use of due, reasonable and ordinary care; but under the operation of this principle, it is a general rule that where an appliance, machine, structure or object is not obviously or inherently dangerous, and has been in daily use, and has proved uniformly adequate, safe and convenient, it may be further continued without the imputation of negligence, although it might have been made safer at slight expense.

Id. at 469-70. Therefore, even if the guy wires could have been marked at slight expense, Appellees did not act willfully or wantonly by not marking the guy wires.

c. Whether Mr. Smoot was contributorily negligent was not ruled upon by the Circuit Court, and should not be considered by this Court.

In a final attempt to place a duty upon Appellees, Appellant argues that Mr. Smoot cannot be contributorily negligent. First, it is important to point out that this issue was never before the Circuit Court. Appellees have not argued at this juncture that Mr. Smoot was contributorily negligent and the Circuit Court has not ruled on this issue. Plainly, however, under the law of comparative fault in West Virginia, evidence can be presented that Mr. Smoot was comparatively negligent in causing this accident; however, this issue is not properly before the Court at this time. Appellant is muddying the waters, in an effort to convince the Court that if Mr. Smoot cannot be contributorily negligent, then he cannot be a trespasser. However, there is no legal connection between Mr. Smoot's status as a trespasser and whether any contributory negligence is attributable to him. Even small children who may not be contributorily negligent can nevertheless be trespassers. *See, e.g., Thompson*, 127 S.E. 531 (four-year-old trespasser); *Nichol*, 109 A. 649 (five-year-old trespasser).

Also, Appellant somehow attempts to link the argument that Mr. Smoot cannot be contributorily negligent with the factual position of Appellant that Mr. Smoot was not out of control at the time of the accident. The ruling of the Circuit Court has nothing to do with whether Mr. Smoot was out of control at the time of his accident. In fact, nowhere in the *Order Granting Defendants' Joint Motion for Summary Judgment* does the Court even include the phrase "out-of-control." Thus, while Appellant would draw this Court's attention to this "hotly disputed" issue, this Court should pay that issue no mind. Even if Mr. Smoot had total control over his bicycle at the time he entered Ms. Farley's property, he was nevertheless a trespasser.[5] The factual issue of whether Mr. Smoot had control of his bicycle has no place before this Court.

d. As holders of valid easements, Appellees properly asserted a trespasser defense.

Appellant argues that Appellees, the holders of easements on the property of Ms. Farley, cannot assert a trespasser defense because they are not landowners. However, Appellant cites no authority for this proposition. It is undisputed that Appellees hold a valid easement or right-of-way where their facilities are located on the property of Anna Jane Farley. Contrary to Appellant's argument, this Court has held that "[i]n cases involving a landowner and an easement over land both the landowner and holder of the easement have mutual rights and duties." *See Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 976, 158 S.E.2d 98, 107 (1967) (citing *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1943)); *see also, Bayes, supra.* According to this statement of the law, it is clear that Appellees, as holders of a valid easement or right-of-way, may assert the same defenses to trespassers as the landowner.

[5] As discussed *supra*, children, like Mr. Smoot, may only avoid the trespasser defense if they are exposed to an "unguarded danger, known to the proprietor, and where it is also known to the proprietor (a) that children are in the habit of resorting for play to his property, at the place of danger, or in its immediate vicinity, or (b) that children are actually present at the time and place of danger." *Adams*, 109 W. Va. at 637, 156 S.E. at 66. As discussed in this brief's section (B)(1)(a), the Appellant's actions do not fall under this exception.

Moreover, it is illogical to conclude that Appellees owed Appellant and others a duty with respect to the guy wires/anchors located on Ms. Farley's property, but cannot assert any defenses against a trespasser of the property.

Appellees properly asserted a trespasser defense. In considering this defense, the Circuit Court correctly held that Mr. Smoot was a trespasser and that Appellees did not inflict willful or wanton injury on him

IV. CONCLUSION

WHEREFORE, the Appellees respectfully assert the lower court was correct in holding that the Appellees have no legal duty to place markers on the guy wires at issue in this matter. In particular, it is clear that the guy wires were not exposed to pedestrian traffic and, as such, there is no requirement under the National Electric Safety Code to require any such markers.

In addition, the Appellant was by the very nature of his actions a trespasser upon the property of Melba Farley and the personal property and easement interests of the Appellees. The Appellees, therefore, owed the Appellant only the duty to refrain from willful or wanton conduct. Clearly, the record is devoid of any evidence establishing willful or wanton conduct on the part of the Appellees. The Appellant's injuries were a result of his own actions in riding his bicycle down the hill and then hitting the rock barrier, and crashing down a steep embankment. The guy wires are in irrelevant factor in Mr. Smoot's accident and injuries.

For the reasons expressed herein, the Appellees jointly request that this Honorable Court affirm the decision of the Circuit Court of Kanawha County, West Virginia, granting summary judgment in favor of the Appellees.

Mark H. Hayes, Esquire (WV Bar 4258)
Robinson & McElwee PLLC
700 Virginia Street, East, Suite 400
Charleston, West Virginia 25301
(304) 344-5800
Counsel for American Electric Power

Ronda L. Harvey, Esq. (WV Bar 6326)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1100
Counsel for Verizon of West Virginia Inc.

Michelle Roman Fox, Esq. (WV Bar 5753)
Martin & Siebert, L.C.
300 Summers Street, Suite 610
Charleston, West Virginia 25301
(304) 345-8020
Counsel for Charter Communications, Inc.